U.S. Customs Service

Treasury Decisions

19 CFR Part 4

(T.D. 02–48)

PLEASURE VESSELS OF MARSHALL ISLANDS ENTITLED TO CRUISING LICENSES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by adding the Marshall Islands to the list of countries whose pleasure vessels may be issued U.S. cruising licenses. Customs has been informed that yachts used and employed exclusively as pleasure vessels belonging to any resident of the U.S. are allowed to arrive at and depart from the Marshall Islands ports and cruise in the waters of the Marshall Islands without being subject to formal entry and clearance procedures. Therefore, Customs is extending reciprocal privileges to Marshall Islands-flag pleasure vessels.

EFFECTIVE DATES: These reciprocal privileges became effective for the Marshall Islands on July 9, 2002. This amendment is effective August 14, 2002.

FOR FURTHER INFORMATION CONTACT: Glen Vereb, Entry Procedures and Carriers Branch, (202) 572–8730.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 4.94(a), Customs Regulations (19 CFR 4.94(a)), provides that U.S. documented vessels with a recreational endorsement, used exclusively for pleasure, not engaged in any trade, and not violating the Customs or navigation laws of the U.S., may proceed from port to port in the U.S. or to foreign ports without entering or clearing, as long as they have not visited hovering vessels. When returning from a foreign port or place, such pleasure vessels are required to report their arrival pursuant to § 4.2, Customs Regulations (19 CFR 4.2).

Generally, foreign-flag yachts entering the U.S. are required to comply with the laws applicable to foreign vessels arriving at, departing from, and proceeding between ports of the U.S. However, as provided in § 4.94(b), Customs Regulations (19 CFR 4.94(b)), Customs may issue cruising licenses to pleasure vessels from certain countries if it is found that yachts of the United States are exempt from formal entry and clearance procedures (e.g., filing manifests, obtaining permits to proceed and paying entry and clearance fees) in those countries.

If a foreign-flag yacht is issued a cruising license, the yacht, for a stated period not to exceed one year, may arrive and depart from the United States and to cruise in specified waters of the United States without entering and clearing, without filing manifests and obtaining or delivering permits to proceed, and without the payment of entrance and clearance fees, or fees for receiving manifests and granting permits to proceed, duty on tonnage, tonnage tax, or light money. Upon arrival at each port in the U.S., the master of a foreign-flag yacht with a cruising license must report the fact of arrival to the appropriate Customs office. A list of countries whose yachts are eligible for cruising licenses is set forth in § 4.94(b).

By an exchange of diplomatic notes between the Government of the Marshall Islands and the United States Department of State, the Marshall Islands and the United States agree to extend to yachts of each other's country reciprocal privileges. Accordingly, U.S.-flag yachts, used exclusively as pleasure vessels and belonging to any resident of the U.S., may arrive at and depart from Marshall Islands ports and to cruise the waters of the Marshall Islands without entering and clearing the Marshall Islands Customs and without payment of any charges for entering or clearing, dues, duty per ton, tonnage taxes, or charges for cruising licenses. Marshall Islands yachts will be entitled to reciprocal privileges in the United States.

On July 22, 2002, the Department of State advised the Acting Chief, Entry Procedures and Carriers Branch, U.S. Customs Service, of the agreement between the United States and the Marshall Islands, which became effective July 9, 2002. The Acting Chief, Entry Procedures and Carriers Branch, is of the opinion that satisfactory evidence has been furnished to establish the reciprocity required in § 4.94(b), effective July 9, 2002. Accordingly, the Marshall Islands is added to the list of countries set forth in § 4.94(b). The authority to amend this section of the Customs Regulations has been delegated to the Chief, Regulations Branch.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS, THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Because this amendment merely implements a statutory requirement and confers a benefit upon the public, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure are unnecessary for this amendment. Further, for the same reasons, good cause exists for the dispens-

ing with a delayed effective date under 5 U.S.C. 553(d)(1) and (3). Since this document is not subject to notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

DRAFTING INFORMATION

The principal author of this document was Janet Johnson, Regulations Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Customs duties and inspection, Maritime carriers, Vessels, Yachts.

AMENDMENT TO THE REGULATIONS

To reflect the reciprocal privileges granted to vessels registered in the Marshall Islands, Part 4, Customs Regulations (19 CFR 4), is amended as set forth below.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority for Part 4 and the specific authority for § 4.94 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C. App.3, 91.

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Section 4.94 also issued under 19 U.S.C. 1441; 46 U.S.C. App. 104.

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2. Section 4.94(b), Customs Regulations (19 CFR 4.94(b)), is amended by inserting, in appropriate alphabetical order, "Marshall Islands" in the list of countries.

Dated: August 8, 2002.

HAROLD M. SINGER,
Chief,
Regulations Branch.

[Published in the Federal Register, August 14, 2002 (67 FR 52861)]

19 CFR Part 177

(T.D. 02–49)

RIN 1515–AC56

ADMINISTRATIVE RULINGS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, with some changes, proposed amendments to those provisions of the Customs Regulations that concern the issuance of administrative rulings and related written determinations and decisions on prospective and current transactions arising under the Customs and related laws. The regulatory changes involve primarily procedures regarding the modification or revocation of rulings on prospective transactions, internal advice decisions, protest review decisions, and treatment previously accorded by Customs to substantially identical transactions. The amendments are in response to statutory changes made to the administrative ruling process by section 623 of the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act.

EFFECTIVE DATE: September 16, 2002.

FOR FURTHER INFORMATION CONTACT: John Elkins, Textiles Branch, Office of Regulations and Rulings (202–572–8790).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Statutory and regulatory background

This document concerns amendments to Part 177 of the Customs Regulations (19 CFR Part 177) regarding the issuance of binding administrative rulings to importers and other interested persons with regard to prospective and current transactions arising under the Customs and related laws. Rulings, determinations, or decisions under specific statutory authorities provided for in the Customs Regulations other than in Part 177 (for example, in Part 133 for enforcement actions regarding intellectual property rights, in Part 174 for protests, and in Part 181 for advance rulings under the North American Free Trade Agreement) are not affected by this document.

On December 8, 1993, the President signed into law the North American Free Trade Agreement Implementation Act (Public Law 103–182, 107 Stat. 2057). Title VI of that Act contained provisions pertaining to Customs Modernization and thus is commonly referred to as the Customs Modernization Act or "Mod Act." The Mod Act included, in section 623, an extensive amendment of section 625 of the Tariff Act of 1930 (19

U.S.C. 1625) which, prior to that amendment, simply required that the Secretary of the Treasury publish in the CUSTOMS BULLETIN, or otherwise make available to the public, any precedential decision with respect to any Customs transaction within 120 days of issuance of the decision. The regulations in Part 177 currently incorporate the terms of 19 U.S.C. 1625 as they existed prior to enactment of the Mod Act.

The Mod Act amendment of section 1625 involved the following specific changes: (1) the existing text was designated as subsection (a), and in new subsection (a) the "120 days" publication time limit was changed to "90 days" and the text was modified to refer to "any interpretive ruling (including any ruling letter, or internal advice memorandum) or protest review decision;" (2) a new subsection (b) was added to provide for administrative appeals of an adverse interpretive ruling and interpretations of regulations prescribed to implement rulings; (3) a new subsection (c) was added to set forth specific procedures for the modification or revocation of interpretive rulings or decisions or previous treatments by Customs; (4) a new subsection (d) was added to provide that a decision that proposes to limit the application of a court decision must be published in the CUSTOMS BULLETIN together with notice of opportunity for public comment prior to a final decision; and (5) a new subsection (e) was added to provide that the Secretary of the Treasury may make available in writing or through electronic media all information which contains instructions, requirements, methods or advice necessary for importers and exporters to comply with the Customs laws and regulations.

The new subsection (c) provisions require publication, in the CUSTOMS BULLETIN and with opportunity for public comment, of any proposal to modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days or which would have the effect of modifying the treatment previously accorded by Customs to substantially identical transactions, require that interested parties be given not less than 30 days after the date of publication to submit comments on the proposed ruling or decision, and require that, after consideration of any comments received, a final ruling or decision be published in the CUSTOMS BULLETIN within 30 days after the closing of the comment period, with the final ruling or decision to become effective 60 days after the date of its publication.

Publication of proposed regulatory changes

On July 17, 2001, Customs published in the Federal Register (66 FR 37370) a notice of proposed rulemaking setting forth proposed amendments to Part 177 of the Customs Regulations which included amendments to Customs procedures in response to the changes made by section 623 of the Mod Act as well as organizational and substantive changes to clarify current administrative practice and otherwise improve the layout and readability of the present regulatory texts. The proposed changes involved principally the following areas: (1) the issuance of rulings and other written advice on prospective transactions;

(2) the appeal of such rulings after issuance; (3) the modification or revocation of rulings on prospective transactions or of protest review decisions or of treatment previously accorded by Customs to substantially identical transactions; (4) the limitation of court decisions; (5) the issuance, appeal, and modification or revocation of internal advice decisions on current transactions; and (6) the treatment of requests for confidential treatment of business information submitted to Customs in connection with a request for written advice. Included in these proposed changes was a restructuring of Part 177 under which new Subpart A would consist of an overview section and a definitions section, new Subpart B would concern prospective rulings, new Subpart C would concern the internal advice procedure, new Subpart D would deal with the disclosure of confidential business information, and present Subpart B would be redesignated as Subpart E.

The July 17, 2001 notice of proposed rulemaking prescribed a 60-day period for the submission of public comments on the proposed regulatory changes. On August 28, 2001, Customs published a notice in the Federal Register (66 FR 45235) extending the public comment period for an additional 30 days, that is, until October 17, 2001. A total of 18 commenters responded to the solicitation of comments in the notice of proposed rulemaking.

The comments received by Customs were almost uniformly opposed to the organizational and substantive changes set forth in the notice of proposed rulemaking. Based on this overwhelmingly negative response, and because most of the changes proposed by Customs were discretionary in nature, that is, they were developed by Customs to address internal administrative concerns of Customs rather than statutory mandates, Customs has decided, with one exception, to withdraw those proposed changes rather than proceed with a final rule. This means that any future action taken by Customs in regard to those withdrawn proposals will be in the form of a new notice of proposed rulemaking that will provide an opportunity for public comment before final action is taken on the proposals.

The one exception to withdrawal of the proposed changes concerns proposed § 177.21, which would implement the 19 U.S.C. 1625(c) provisions regarding the modification or revocation of prospective rulings, internal advice decisions, protest review decisions, and previous treatment of substantially identical transactions. For the reasons explained below, Customs has determined that it is essential to proceed with implementation of the terms of 19 U.S.C. 1625(c) through appropriate regulatory standards.

Under the framework set forth by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984), which was applied by the Court to Customs Regulations in *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999), a regulation promulgated by an administrative agency, if it represents the agency's statutory interpretation that fills a gap or defines a term in a way that is

reasonable in light of the legislature's revealed design, must be given controlling weight and thus will receive judicial deference. The need for regulatory standards is particularly acute regarding the modification and revocation provisions of 19 U.S.C. 1625(c) in order to (1) provide an appropriate regulatory basis for administrative procedures that Customs applies under the statute following passage of the Mod Act provisions, (2) provide guidance regarding the meaning of the statutory terms, in particular, the meaning of the term "treatment," (3) clarify the relationship between the procedures under 19 U.S.C. 1625(c) and other legislative, judicial or administrative actions that have the same effect as a modification or revocation under that statutory provision, and (4) prescribe standards for the application of the statutory modification or revocation effective date provisions to Customs transactions.

As explained in detail in the preamble to the July 17, 2001, notice of proposed rulemaking, proposed § 177.21 was drafted in order to set forth the Customs interpretation and application of the statutory modification and revocation provisions. That proposed text engendered a significant number of comments, which are discussed below. In addition, Customs performed an internal review of the proposed text after the close of the comment period (1) to determine whether additional clarification of the Customs position regarding the modification or revocation of treatments was necessary beyond any changes suggested by the commenters and (2) as a consequence of the decision not to proceed with the proposed restructuring of Part 177, to assess the manner in which the proposed § 177.21 text could best be included within the existing Part 177 regulatory framework. The decisions taken as a result of that internal review are reflected in the discussion of the additional changes to the regulatory texts which follows the comment discussion.

DISCUSSION OF COMMENTS

Of the 18 commenters who responded to the solicitation of comments on the proposed Part 177 changes, 14 provided one or more specific comments on the proposed § 177.21 text. The comments are discussed below.

Comment:

Five commenters took issue with the statement in the first sentence of proposed § 177.21(a) that a prospective ruling or an internal advice decision or a holding or principle covered by a protest review decision may be modified or revoked if found to be in error or not in accord with the current views of Customs. Three of these commenters argued that the regulations need more specific criteria (rather than only "if found to be in error or not in accord with the current views of Customs") in order for Customs to modify or revoke current rulings: modification or revocation should be limited to situations where there has been a change in the law, or where the previous interpretation of Customs is construed to be erroneous as a matter of law, and *not* merely because Customs changes its mind. Another commenter stated that modification or revocation of rulings or decisions found to be "not in accord with the current views of

Customs" should be limited to purely administrative positions and should not include derogation of a court ruling or other higher authority, because Customs cannot take a "current view" contrary to a higher authority, and the commenter suggested that this point should be clarified in the final regulations. One commenter stated that the words "not in accord with the current views of Customs" are too vague and should be replaced by a statement that the authority of Customs to modify or revoke is limited to situations where there are two or more inconsistent rulings, because this is how the words in question have historically been applied. Finally, one commenter pointed out that, even under the level of deference adopted in *United States v. Mead Corp.*, 121 S. Ct. 2164 (2001), Customs is entitled to deference only if it has provided a well-thought-out position, and this standard is not reflected in this proposed provision.

Customs response:

Customs first notes that the phraseology in question, that is, "in error or not in accord with the current views of Customs," does not constitute a new regulatory standard but rather merely reflects a standard that has existed in the regulations for many years under 19 CFR 177.9(d)(1). Moreover, while the proposed § 177.21 text was intended to carry out the terms of 19 U.S.C. 1625(c) as added by section 623 of the Mod Act, it is noted that the statutory amendment did not create new substantive standards that Customs must apply in deciding whether to modify or revoke a ruling, etc., but rather merely imposed certain procedural safeguards regarding modification or revocation actions. Therefore, Customs believes that the submitted comments are directed primarily to historical Customs practices rather than to new statutory standards imposed by the Mod Act changes. This being said, Customs in part agrees and in part disagrees with the points made by these commenters.

Customs agrees that, as a basic principle, a ruling, etc., should be modified or revoked if it is "erroneous as a matter of law," and, for that reason, the regulatory text in question continues to provide that, "if [a ruling is] found to be in error," modification/revocation authority will be exercised. The suggestion that Customs might modify or revoke a ruling for other than legal reasons is incorrect. All proposed modifications/revocations issued under 19 U.S.C. 1625(c) will be based upon the current views of Customs regarding the proper interpretation of the law.

The modification or revocation of a ruling or decision has always involved a purely administrative position, and nothing in the proposed regulatory texts purported to change that fact or to otherwise suggest that a modification or revocation might be in derogation of an applicable court decision or other higher authority. However, Customs believes that inclusion in the regulations of a statement on this point is unnecessary.

Customs does not agree that the words "not in accord with the current views of Customs" have historically been applied in modification or revocation cases only where there are two or more inconsistent rulings.

The phrase in question has been applied by Customs in a variety of different circumstances not involving inconsistent rulings, including circumstances in which all extant rulings on a particular issue are consistent but legally incorrect. Therefore, the statement suggested by the commenter should not be included in the regulatory text.

Finally, Customs does not believe that the issue of deference under the *Mead* case is appropriate for treatment in this regulatory context. The *Mead* case concerned the degree to which the courts may give deference to rulings issued by Customs, which is a function of the ruling itself and not the regulations under which the ruling is promulgated. The granting of deference is a matter for the courts to decide and is not a proper subject for these regulations.

Comment:

Two commenters questioned whether the intent of referring to "prospective" rulings, as opposed to "interpretive" rulings as used in the statute, is intended to give greater breadth to the notice and comment regulation. If only related to prospective rulings, these commenters questioned how it can apply to internal advice rulings, which are considered current transactions, or to protest review decisions, which involve entries already liquidated. As to the reference to coverage of the regulation to protest review decisions, these commenters expressed uncertainty regarding how Customs intends to implement 19 U.S.C. 1625(c). They stated that they suspect that the new regulation is nothing more than an embodiment of existing practice whereby Customs Headquarters issues a section 1625 notice and comment when a holding or principle reflected in a previous protest review decision is modified or revoked, either by the issuance of a prospective ruling, or internal advice or protest review decision. The commenters felt that the interaction between the administrative rulings regulations, 19 CFR Part 177, and the protest regulations, 19 CFR Part 174, is highlighted by the comments here and, because of this, they expressed the belief that it would be appropriate for Customs simultaneously to revise Part 174 as well.

Customs response:

In the preamble portion of the July 17, 2001, notice of proposed rulemaking Customs gave two reasons for referring to "prospective" rulings in the proposed § 177.21 text (see 66 FR 37374). First, the chosen terminology reflects a decision Customs has taken to use a prospective ruling as the means for carrying out a modification or revocation referred to in the statute or in the present regulatory text. Second, as regards what may be the subject of a modification or revocation, the reference to "prospective" (rather than "interpretive") rulings was intended to ensure coverage of all rulings issued under new Subpart B. Thus, under the proposed text, only a prospective ruling issued under Subpart B (and not, for example, an internal advice decision issued under proposed Subpart C) could effect a modification or revocation. In light of the decision not to proceed with the organizational changes set forth in the proposed rulemaking, Customs has reconsidered the use of the word "prospec-

tive." Accordingly, the regulatory text will follow the statutory language and refers to "interpretive" rulings, which includes internal advice decisions.

As regards the commenters' concerns regarding the relationship between Part 174 and Part 177, they are correct that the proposed regulatory text in effect embodies present administrative practice except for the fact that, as explained above, Customs uses an interpretive ruling (but not an internal advice decision and not a protest review decision) as the modifying or revoking vehicle. With regard to the suggestion that Parts 174 and 177 be revised simultaneously, Customs does not believe that this would be appropriate given the separate statutory bases for the two parts and the narrowed focus of this final rule document. However, the current administrative procedure will continue as regards the modification or revocation of a holding or principle contained in a protest review decision, and Customs at an appropriate future date will propose conforming changes to the Part 174 texts to refer to the procedures embodied in the Part 177 texts.

Comment:

Customs should not modify or revoke any ruling in a manner that is adverse to an interested party unless the original ruling is clearly wrong, such as where a new law is passed, a provision in the HTSUS has been enacted, or a new court decision has been issued.

Customs response:

Customs does not disagree with the suggestion that a ruling that is "clearly wrong" should be modified or revoked, and, for that reason, Customs retains in the regulatory text the authority to propose a modification/revocation if a ruling "is found to be in error." Moreover, the commenter appears to entirely misconstrue the scope of both the statute and the proposed regulatory text. The Mod Act changes reflected in the 19 U.S.C. 1625(c) procedures were directed to discretionary decisions taken by Customs on its own initiative under its administrative authority and were not intended to affect legislative, judicial or other actions over which Customs has no control. It was for this reason that Customs included paragraph (d) of proposed § 177.21 which lists exceptions to application of the notice requirements of paragraphs (b) and (c). The "clearly wrong" standard as suggested by the commenter would be too restrictive and contrary to the legislative intent.

Comment:

It should be more difficult for Customs to revoke an existing ruling, because importers need to be able to rely on rulings in order to plan their business. While the fact that a hardship can result from a sudden revocation of a ruling is not a new issue, it was recently raised in *Heartland By-Products, Inc. v. United States of America and United States Beet Sugar Association*, Slip Op. 99–110 (CIT 1999). Based on a ruling obtained from Customs that classified a sugar syrup in a tariff provision to which the tariff rate quota system of the U.S. sugar program did not ap-

ply, Heartland in 1997 invested $10 million in a syrup importing and refining operation. Subsequently, domestic sugar manufacturers sought a reclassification of Heartland's syrup and Customs in 1999 published a notice of its intent to revoke the Heartland ruling, the effect of which would have been to raise the tariffs Heartland would have to pay by more than 7000 percent, thereby effectively forcing Heartland to shut down its operation. The Court of International Trade in its decision determined that Customs' reclassification of the sugar syrup was arbitrary, capricious and an abuse of discretion.

Although *Heartland* is an extreme example, the sudden revocation of a ruling may raise important reliance issues. Due to the similarity between Internal Revenue Service private letter rulings and Customs rulings (in particular as regards their applicability only to the persons who requested them and as regards their validity only to the extent that the facts are correct), the sense of fair play that applies to IRS rulings (that is, that once issued, a ruling can be acted on with reliance and thus should not be disturbed) should also apply to Customs rulings. Moreover, based on a basic notion of fairness, the doctrine of equitable or regulatory estoppel should apply to, and thus should be a bar to, the revocation of rulings, particularly where a party has relied on a ruling to its detriment. Another possible solution to the detrimental reliance issue would be to adopt a binding declaratory ruling procedure similar to the declaratory judgment used by the courts, with the declaratory ruling being binding on Customs so that Customs could not change its position once the recipient has acted in reliance on the ruling. Another solution to detrimental reliance might be to apply administrative equity principles involving hardship exceptions (when a substantial hardship on the petitioner would result), fairness exceptions (when a rule is unreasonable when applied to the petitioner) and policy exceptions (when the goal or purpose of the rule can be achieved by other means).

Customs response:

Customs does not believe that the decision of the Court of International Trade in the *Heartland* case cited by this commenter serves as a proper example for the various points made by the commenter, because that decision was reversed by the United States Court of Appeals for the Federal Circuit in *Heartland By-Products, Inc. v. United States and United States Beet Sugar Association*, 264 F.3d 1126 (2001) and because that litigation remains pending as Heartland filed a petition for Supreme Court review on April 3, 2002.

While Customs would agree with the general proposition that importers need to be able to rely on rulings issued under Part 177 in order to plan their business, that reliance has never been an absolute right. Section 177.9(a) of the Customs Regulations (19 CFR 177.9(a)), which predated the statutory changes made by the Mod Act, provides, among other things, that a ruling letter issued by Customs under Part 177 is binding on all Customs personnel in accordance with the provisions of that section until modified or revoked and, in the absence of a modifica-

tion or revocation which affects the principle of the ruling, may be cited as authority in the disposition of transactions involving the same circumstances. Thus, even before the Mod Act changes to 19 U.S.C. 1625, reliance on rulings was a qualified right.

With regard to the suggestions that it should be more difficult for Customs to revoke an existing ruling, that a hardship results from a "sudden" revocation of a ruling, and that principles of detrimental reliance, fair play, equitable or regulatory estoppel, binding declaratory rulings, and administrative equity should be applied, Customs believes that the public notice and comment and delayed effective date provisions of 19 U.S.C. 1625(c) reflect the full extent to which Congress believes that these principles should apply to Customs rulings. Accordingly, it would be inappropriate for Customs to adopt additional regulatory standards that might be inconsistent with the limited procedural safeguards established by Congress in the statute.

Comment:

Three commenters argued that, as a matter of fairness and due process, Customs should publish a notice and allow public comment also in cases in which 60 days have not passed since issuance of the ruling. Another commenter, after referring to the 60-day period during which no notice or comment period is contemplated, stated that the regulations should be clarified so that "no notice or comment period" will apply only in cases involving clerical errors because a change to the substance or logic of a decision should be subject to public notice and comments.

Customs response:

The proposed regulatory text follows the statute in providing for public notice and comment procedures only in the case of a modification or revocation of a ruling that has been in effect for 60 or more days. That 60-day period was included in the Mod Act changes to section 1625 and, in Customs view, represents an implicit statement by Congress on the issue of fairness and due process when there is a change to the substance or logic of a ruling.

With regard to clerical errors, proposed § 177.21(d)(2)(i) follows the statute in providing that no publication (and thus no public notice and comment) is required if the modifying ruling corrects a clerical error.

Comment:

One commenter suggested that, although the concept of distinguishing between rulings that have been in effect for less than 60 calendar days and those in effect for 60 or more calendar days is appropriate, proposed § 177.21(e)(1), which addresses rulings or decisions in effect for less than 60 days, should be modified to address a situation in which a person obtains a prospective ruling and orders goods in reliance on it, because that person should not have the ground rules changed with respect to goods that are covered by bona fide long-term contracts or are already ordered and/or en route to the United States on the date of is-

suance of the modification or revocation but that are actually imported on or after the date of issuance of the modification or revocation. Along a similar line, another commenter stated that proposed § 177.21(e)(1) fails to take into account the situation where an importer orders goods in reliance upon a ruling or decision only to have it modified or revoked without notice and opportunity to comment: the regulations should address this type of situation because to not do so could potentially result in a great hardship to an importer who dutifully followed a reasonable course of action.

Customs response:

Customs believes that the issues of good faith reliance and potential hardship have been addressed by Congress in the changes to section 1625 made by the Mod Act. Congress expressly chose to make a distinction between rulings in effect for less than 60 days (for which public notice and comment and delayed effective date requirements do not apply in the case of a modification or revocation) and rulings in effect for 60 days or more (in which case modification or revocation is subject to public notice and comment and delayed effective date requirements). The provisions of proposed § 177.21(e)(1) merely reflect this distinction as regards the effective date for a modification or revocation of a ruling that has been in effect for less than 60 days.

In the preamble portion of the July 17, 2001, notice of proposed rulemaking Customs stated that it was proposing "to eliminate the principle of detrimental reliance (which was a purely regulatory creation) from the Part 177 texts because the Mod Act statutory amendments regarding the modification or revocation of rulings and previous treatment (including the provision for a delayed effective date) accomplish essentially the same purpose and therefore should be viewed as replacing it." In view of this stated position, Customs does not believe that it would be appropriate to reinsert the concept of detrimental reliance in response to these comments. Furthermore, introduction of a detrimental reliance standard would be contrary to the regime created by Congress in the statute.

In particular with regard to prospective rulings issued under Part 177, the terms of section 1625(c) implicitly encourage members of the trade community to exercise prudence in signing contracts before receipt of a needed ruling or during the 60-day period after issuance of the ruling, because there is always a possibility that the issued ruling will conflict with the expectations under the contract or will be modified or revoked to the recipient's detriment without advance notice during the 60-day period after issuance. The same need for prudence would apply in the case of a long-term contract signed more than 60 days after the issuance of a ruling because of the possibility that a later modification or revocation of the ruling could compromise the terms of the ongoing contract, and in this case the fact that the public notice and comment and delayed effective date provisions under section 1625(c) were followed might afford minimal benefit to the ruling recipient as regards his con-

tractual obligations. Moreover, Customs would suggest that ruling recipients could mitigate the negative effect of a modification or revocation both during and after the 60-day period by including escape clauses in their contracts which would provide a way out if Customs modified or revokes a ruling.

Finally, the commenters observations appear to be directed to situations in which a modification or revocation has a negative impact on the interests of the ruling recipient. However, there could be circumstances in which the modification or revocation militates in the favor of the ruling recipient.

Comment:

Four commenters stated that reliance on publication of a proposed modification or revocation only in the CUSTOMS BULLETIN creates a potential problem because there have been significant delays in distributing the CUSTOMS BULLETIN beyond the normal 2-week delay and thus there is not sufficient time to respond to the proposed change. Therefore, these commenters suggested that Customs should commit to posting all proposed modifications or revocations at an Internet-accessible location, and two of these commenters suggested as an alternative that Customs should allow more time to comment. Two other commenters opined that the 30-day period for commenting is too short, and one of these commenters argued that a period of at least 60 days should be allowed for submitting comments on a proposed modification or revocation.

Customs response:

Publication in the CUSTOMS BULLETIN must remain the publication standard for legal purposes, including for purposes of establishing the start of the comment period, because that is the procedure prescribed in the statute. However, in recognition of the delays associated with CUSTOMS BULLETIN publication and distribution, Customs has adopted two additional "heads up" procedures to alert interested parties to the impending modification or revocation action. One of these procedures involves posting the notice of the proposed modification or revocation on the Customs Internet web site. The other procedure involves writing to all parties identified in the notice of proposed action as recipients of the ruling or decision or treatment that is the subject of the proposed modification or revocation.

With regard to the 30-day comment period, which represents the minimum standard required by the statute, Customs did not opt for a longer period for several reasons. First, a longer comment period would only serve to delay the adoption of a final modification or revocation and thus would interfere with another important mission of Customs which is to ensure proper application of the law at the earliest practicable date. Second, the additional "heads up" procedures mentioned above typically take place several days before CUSTOMS BULLETIN publication and thus have the practical effect of extending the comment period by providing advance notice of the proposed action. Third, Customs does not

believe that a longer period is needed, particularly in view of the fact that the affected parties already are generally knowledgeable regarding the issue raised in the proposed modification or revocation and therefore should not require an extended period of time in which to prepare a response to the proposed action.

Comment:

Four commenters argued that the notice and comment provisions should not apply in the case of a ruling that is the subject of an appeal under proposed § 177.20 if transactions covered by the ruling have been held in abeyance pending a favorable decision on the appeal, because the ruling has not been applied to an actual transaction and thus should not be considered to be in effect for purposes of the 60-day period after which the notice and comment procedure is required.

Customs response:

Customs does not agree with the premise that underlies the position of these commenters, that is, that a ruling is not considered to be in effect if it has not been applied to an actual transaction. On the contrary, as stated in present § 177.9(a) and as repeated in proposed § 177.19(a), a ruling is generally effective on the date of issuance (a principal exception to this general rule would be a modifying or revoking ruling to which the statutory 60-day delayed effective date applies). Thus, the fact that an appeal of a ruling is pending does not delay the effective date of the ruling and therefore does not delay the running of the 60-day period after which a ruling may be modified or revoked only after the statutory public notice and comment procedures have been completed. Moreover, the position of Customs regarding the application to current transactions of a ruling undergoing an appeal was made clear in proposed § 177.20(e) which provided that the filing of an appeal "will not result in a suspension of liquidation in the case of current transactions" (while Customs might decide to delay liquidation pending a decision on the appeal, the decision to do so would be made based on operational considerations that are not a function of the Part 177 texts).

Comment:

Two commenters complained that Customs appears to be requiring that people come forward and advise Customs that they have a ruling when they are not specifically identified in the published notice, but the statute did not intend that such a burden be imposed on the public.

Customs response:

Customs believes that these commenters have misread the proposed regulatory text. Proposed § 177.21(b)(1), which concerns publication of the proposed action, provides in this regard that the notice will refer to all previously issued rulings that Customs has identified as being the subject of the proposed action and will "invite" any member of the public who has received another ruling involving the issue that is the subject of the proposed action to advise Customs of that fact. Nowhere does the

regulatory text require a member of the public to respond to the notice. Moreover, proposed § 177.21(b)(2), which concerns the notice of final action, specifically provides that publication of a final modifying or revoking notice will have the effect of modifying or revoking "any" ruling that involves merchandise or an issue that is substantially identical in all material respects to the merchandise or issue that is the subject of the modification or revocation, including a ruling "that is not specifically identified in the final modifying or revoking notice." Therefore, an unidentified ruling recipient does not have to respond to the notice in order for the modification or revocation to apply to his ruling.

Customs further notes that even though a response to the notice of proposed modification or revocation is not required, there may be circumstances in which an affected ruling recipient not identified in the notice would prefer to respond to the notice. A response to the notice would mean that the ruling recipient would receive a final written decision on the proposed modification or revocation directly from Customs. Moreover, this would facilitate the exercise of the ruling recipient's option under proposed § 177.21(e)(2)(ii) to have the position reflected in the modification or revocation applied to his transactions upon publication of the final notice in the CUSTOMS BULLETIN rather than 60 days thereafter.

Comment:

Three commenters noted that the statute imposes a responsibility on Customs to publish notice and allow for comment when it contemplates modification or revocation of rulings. Thus, these commenters argued that it is incumbent upon Customs to identify the relevant rulings, either those directly involved or those affecting substantially identical merchandise or issues. The commenters believe that imposition of this burden on the importing community is antithetical to the role of Customs in the partnership created by "informed compliance," and it imposes an impossible burden on the importing community which must speculate as to which rulings are covered. The commenters further complained that reference in current modification or revocation notices imposing an obligation on importers to come forward and speculate whether their rulings are "substantially similar" or risk being found not to have exercised "reasonable care" is again antithetical to the concept of "informed compliance," whereby Customs must clearly state its position so that the public knows what is expected of it.

Another commenter similarly argued that requiring the public to report to Customs rulings that are potentially affected by a proposed modification represents an onerous burden and puts importers in an impossible situation because proposed modifications do not specify the practice or position that is being altered: typically, there is a clear change in classification but there is no clear identification of the practice or policy being changed, and thus it requires gross speculation on the part of importers.

Customs response:

As pointed out in the preceding comment response, there is no requirement that a ruling recipient come forward in response to a notice of proposed modification or revocation. Therefore, Customs does not agree with the commenters that the proposed regulatory text imposes an onerous or impossible burden on the importing community. When Customs determines that a proposed modification or revocation action is appropriate, Customs first endeavors to identify all rulings that would be affected by the proposed action so that they may be identified in the notice of the proposed action. It must be recognized, however, that a review of the available records may not disclose all existing affected rulingshence the invitation in the proposed regulatory text for other ruling recipients to come forward.

Customs also disagrees with the suggestions that the notices of proposed modification or revocation do not clearly state the position of Customs and do not clearly identify the practice or policy that is being changed. Customs believes that the published notices of proposed modification or revocation are, by-and-large, clear and complete on these points. What may not be clear is the extent to which the proposed action would affect rulings not identified in the notice that appear to be similar or related to the identified ones but that involve varying degrees of differences in the factual patterns or issues identified in the proposal. It is not possible for the notice of proposed modification or revocation to be definitive in this area because what is involved is essentially a judgment call requiring a determination on a case-by-case basis. Moreover, it should be noted that while Customs issues thousands of rulings each year, the average importer receives only a handful of rulings during a given year; therefore, the importer is in a far better position to assess the impact of a proposed modification or revocation on the handful of its rulings than is Customs which is required to employ a much wider frame of reference. The invitation to the public to participate at the proposal stage, which also includes an opportunity to comment on the proposed action, can also serve as a mechanism for obtaining clarification on this type of issue.

As concerns the comments regarding reasonable care, Customs notes that the exercise of reasonable care by importers at the time of entry is a requirement under section 484(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1484(a)), and therefore is not a direct function of the ruling modification or revocation process under 19 U.S.C. 1625(c) and the proposed Part 177 regulatory texts. Nevertheless, there is a connection between the exercise of reasonable care at the time of entry and the ruling modification or revocation process in that an importer who has a ruling that has been modified or revoked could be liable for a penalty under section 592 of the Tariff Act of 1930, as amended (19 U.S.C. 1592), for failure to exercise reasonable care if he continues to enter his merchandise in accordance with the modified or revoked ruling after the modification or revocation has taken effect. This is the basic point of publishing modi-

fication or revocation proposal notices. Of course, the determination of whether an importer has failed to exercise reasonable care must be made on a case-by-case basis based on an assessment of all relevant factors, and it is for this reason that the proposed modification or revocation notice refers to "the rebuttable presumption of lack of reasonable care on the part of the importer or its agents" for failure to follow the result reflected in the notice.

Comment:

One commenter claimed that the relationship between proposed § 177.21(c) and 19 U.S.C. 1315(d) is not clear because the notice provisions of the regulation are inconsistent with those of the statute, because the statute speaks of an established and uniform practice, and because, even though proposed § 177.21(d)(1)(viii) suggests that the provisions of proposed § 177.21 are inapplicable, there is an element reminiscent of a "simultaneous equation" associated with the two provisions (the commenter asked in this regard whether, for example, Customs is attempting to state that a two-year period immediately prior to publication is insufficient to establish a uniform practice). This commenter argued that, therefore, the purpose of § 177.21(c) is unclear.

Customs response:

Customs believes that the purpose of proposed § 177.21(c) is clear: it implements the terms of 19 U.S.C. 1625(c) as regards the modification of treatment previously accorded by Customs to substantially identical transactions, which is subject to the same public notice and comment and delayed effective date requirements that apply in the case of a modification or revocation of a ruling or decision that has been in effect for 60 or more days. It does not implement or otherwise affect established and uniform practices referred to in 19 U.S.C. 1315(d) which were the subject of proposed new § 177.22.

The relationship between proposed § 177.21(c) and 19 U.S.C. 1315(d) involves separate statutory and regulatory contexts (the 19 U.S.C. 1315(d) provisions are presently dealt with in the Customs Regulations in 19 CFR 177.10(c)), and therefore they operate independently of each other. The notice and delayed effective date provisions are different in the two statutes (one provides for publication in the Federal Register and specifies a 30-day delayed effective date and the other prescribes publication in the CUSTOMS BULLETIN and a 60-day delayed effective date). Therefore, the two provisions cannot operate simultaneously, and it was for this reason (as well as for purposes of administrative efficiency) that Customs provided in proposed § 177.21(d)(1)(viii) that the publication and issuance requirements set forth in paragraphs (b) and (c) of proposed § 177.21 do not apply if a modification or revocation in effect results from publication of a final ruling regarding a change of established and uniform practice under 19 U.S.C. 1315(d). The 2-year period for a treatment prescribed in proposed § 177.21(c) has no bearing on whether an established and uniform practice exists within the meaning of 19 U.S.C. 1315(d), and, furthermore, the standards for determining

whether a treatment exists differ from those that apply in determining whether there is an established and uniform practice in that in the latter case the uniformity must be nationwide for all Customs transactions involving the issue in question. Accordingly, there is no "simultaneous equation" as regards the statutory or regulatory provisions of these two programs.

Comment:

Five commenters argued that "treatment" should not be restricted to the classification of merchandise, because other areas (for example, valuation, country of origin marking, entry, and carriers) also involve treatments. Along the same line, another commenter suggested that the definition of "treatment" as relating to the "classification of imported merchandise" should be changed to refer to "a consistent pattern involving imported merchandise" because not including other issues is unwarranted and is not a reasonable interpretation of 19 U.S.C. 1315(d).

Customs response:

For the reasons stated in the preceding comment response, Customs does not agree with the suggested connection between "treatments previously accorded" under proposed § 177.21(c) which implements 19 U.S.C. 1625(c) and "established and uniform practices" under 19 U.S.C. 1315(d). However, Customs agrees with the main point made by these commenters that "treatment" should not be limited to decisions involving the classification of imported merchandise. The regulatory text set forth in this final rule document has been modified accordingly.

Comment:

Five commenters objected to the statement in proposed § 177.21(c)(1)(ii) that a person may not claim as a treatment the treatment that Customs accorded to transactions of another person. These commenters made the following specific points in support of the proposition that a person should be able to claim as a treatment the treatment accorded to transactions of another person:

1. In light of the official doctrine of uniformity, it is unacceptable that treatment accorded to transactions of another importer should not be considered at all: so long as sufficient data of the importations of other importers is provided, those importations should be relevant in determining whether a treatment exists.

2. Customs should abandon the notion that treatment is personal and should retain the standard in the current regulation, § 177.9(e), which describes "modifying the treatment previously accorded by the Customs Service to substantially identical transactions of either the recipient of the ruling letter or other parties," because, as Customs noted in the notice of proposed rulemaking, Congress modeled section 1625(c) on that current regulation.

3. The proposed limitation of treatment to those who received the treatment will render section 1625(c)(2) virtually meaningless since

Customs has no means to identify specific parties who may have received a prior treatment and thus would not be required to publish a decision which modifies a prior treatment.

4. If this definition of treatment is retained, the effect will be negative for both Customs and the import community because it will increase the burden on both since it will serve to reinforce the requirement that importers seek their own binding rulings and not take the risk of relying on a ruling issued to another party.

Customs response:

Customs remains of the view that, for purposes of 19 U.S.C. 1625(c)(2) and the regulatory provisions thereunder, "treatment" must have reference only to the transactions of the person who is claiming the existence of the treatment and therefore cannot be claimed by a person who has had no transactions that have been the subject of the treatment under consideration.

Customs recalls that the Mod Act changes reflected in the text of 19 U.S.C. 1625(c) were included at the insistence of the trade community to ensure that there would be a statutory protection against abrupt changes made by Customs without adequate prior notice, particularly where the change is to a ruling or decision issued by Customs, or to a pattern of actions taken by Customs on import transactions, on which a party has reasonably relied in pursuing its Customs transactions. Implicit in the Mod Act statutory changes was the idea that reasonable expectations created by the actions of Customs were entitled to some protection from subsequent actions taken by Customs. Thus, 19 U.S.C. 1625(c)(1) refers to the modification or revocation of "a prior interpretive ruling or decision which has been in effect for at least 60 days" and 19 U.S.C. 1625(c)(2) refers to the modification of "the treatment previously accorded by the Customs Service to substantially identical transactions."

For reasons of practicality, Customs disagrees with the suggestion of one of the commenters that importations of other importers should be relevant in determining whether a treatment exists so long as sufficient data regarding those importations is provided. In this regard, Customs notes that the proposed regulatory text in § 177.21(c)(1)(iii) set forth detailed requirements regarding the information that must be provided to Customs in connection with a claim that a treatment exists (for example, entry numbers and quantities and values of the imported merchandise) so that Customs may make an appropriate determination on the claim. This type of entry information is treated by Customs as confidential business information that is not disclosed to the public, and therefore it would not be available to parties who are not privy to the transactions in question. Accordingly, persons attempting to rely on a treatment accorded to another person's transactions would be unable to meet the requisite burden of proof set forth in the proposed regulatory text. In fact, in many cases a person would not even know of the other person's transactions or would not be able to determine with certainty

that the other person's transactions are substantially identical to his own.

With regard to the comment that Customs should abandon the notion that treatment is personal and rather retain the standard in present § 177.9(e), Customs believes that the commenter has misread the present text. That regulatory provision, which the commenter correctly notes was in part the genesis of the statutory "treatment" provision added by the Mod Act, refers to "treatment previously accorded * * * to substantially identical transactions of * * * other parties." The words "other parties" clearly relate only to parties who had transactions that received the treatment in question and *not* to parties who did not have transactions that received the treatment. Therefore, Customs believes that the proposed text is entirely consistent with the present § 177.9(e) text in making a clear connection between the person whose transactions received the treatment and the person who is claiming the treatment. Further, to grant a ruling or treatment universal applicability, as the commenter is proposing, would elevate each ruling or treatment to the level of an established and uniform practice and thus would render the provisions of 19 U.S.C. 1315(d) redundant and a nullity.

Customs disagrees with the commenter who alleged that the limitation of treatment to those who received the treatment will render the statutory provision meaningless because Customs will not be able to identify specific parties who received a treatment and thus will not be required to publish a decision modifying the treatment. Customs did recognize that there would be instances in which Customs is not aware, prior to issuance of a contemplated prospective ruling, that the ruling would have the effect of modifying or revoking a previous treatment, and this type of scenario was directly addressed in proposed § 177.21(c)(2)(ii). Under the proposed text, an unidentified treatment recipient would have the opportunity to write to Customs after the issuance of the ruling and obtain the protections afforded by the public notice and comment and delayed effective date provisions if an adequate case regarding the existence of the treatment is made.

The argument regarding the potential increased burden on Customs and the import community is not persuasive, for two reasons. First, even if the commenter's assumption were correct, the possibility of an increased burden on the government and on the private sector is not a sufficient basis for reaching a regulatory result that is not in accord with the underlying statutory text. Second, the decision of an importer whether to seek its own binding ruling or rely on a ruling issued to another party is a private business decision that has no effect on the issue of what constitutes a treatment.

For the above reasons, Customs believes that treatments under 19 U.S.C. 1625(c)(2) must relate to expectations created on the basis of a track record involving transactions of the person claiming the existence of the treatment.

Comment:

The proposed regulatory provisions regarding the modification or revocation of previous treatments are at variance with the decision of the U.S. Court of International Trade in *Precision Specialty Metals, Inc v. United States*, 116 F.Supp. 2d 1350 (2000), in particular as regards what constitutes a "treatment." In this regard, the *Precision* case simply states that a treatment may pertain to any "decision" made by Customs and, therefore, the provisions for a 2-year treatment period and for according diminished weight in the case of merchandise of smaller quantities or value and no weight in the case of informal entries are contrary to the judicially created standard. Moreover, as regards the 2-year treatment period, this requirement is unnecessary because importers who create the 2-year schedule will simply request the information from the Office of Strategic Trade in Customs under the Freedom of Information Act and, upon receipt of the information in Microsoft Access format, the importer would simply send the information back to Customs.

Customs response:

The *Precision Specialty Metals* case involved a review of a denial by Customs of a protest against a decision of Customs to deny drawback on 38 entries of stainless steel trim and scrap. One of the issues addressed by the court was whether the payment of drawback on 69 previous entries of stainless steel scrap was a "treatment" under 19 U.S.C. 1625(c) which, if so, would mean that the decision on the protest was invalid if Customs had not first published a proposed and final modification or revocation of that treatment as required by the statute. However, Customs notes that the decision cited by the commenter (referred to in this comment discussion as *Precision I*) did not involve a substantive ruling on the treatment issue because the court concluded that the importer had not presented the court with sufficient record evidence to conclude that all required elements of section 1625(c) were satisfied: the Court of International Trade addressed the merits of the treatment issue in a subsequent decision involving the same parties and the same 38 entries, *Precision Specialty Metals, Inc v. United States*, Slip Op. 01–148, decided December 14, 2001 (referred to in this comment discussion as *Precision II*). Nevertheless, the court in *Precision I*, in reciting the criteria that the court would use in analyzing the importer's claim for relief under section 1625(c), stated that "[t]he term 'treatment' looks to the *actions* of Customs, rather than its 'position' or policy," and that the term "treatment" is "distinct from the terms 'ruling' and 'decision'" which are covered elsewhere in section 1625(c). The *Precision I* court then stated: "This construction would recognize that importers may order their actions based not only on Customs' formal policy, 'position,' 'ruling' or 'decision,' but on its prior actions. This construction furthers the stated legislative intent underlying § 1625(c)."

In *Precision II*, the court specifically found that, in connection with "pre-liquidation reviews" of three of the earlier 69 drawback entries that were eventually liquidated for the full amount of drawback

claimed, Customs had asked the importer for additional information and documentation on the exports involved. In response, the importer furnished Customs with additional information and documentation which showed that the exported material was stainless steel scrap. The court further found that the facts set forth in a stipulation of facts agreed to by the parties were sufficient to resolve the factual issues outlined in *Precision I* so that the court could resolve the "treatment" issue on a motion for summary judgment. The court, in concluding that the actions of Customs gave rise to a treatment under section 1625(c), specifically noted "the consistent trail of correspondence and submissions in which Precision and its agents describe the entries on which drawback was granted as 'scrap'" and reiterated its holding in *Precision I* that "treatment" looks to the *actions* of Customs rather than a "position" or "policy" of Customs.

Based on the facts that were under review in *Precision I* and *Precision II*, Customs does not agree with the commenter's assertion that the proposed regulatory text is contrary to the standard set forth by the court. On the contrary, it is the position of Customs that the proposed regulatory standard is consistent with the court cases because it requires an actual action on the part of Customs (as distinguished from non-action on the part of Customs, for example, when an entry is liquidated automatically without Customs review or when an entry is liquidated by operation of law under 19 U.S.C. 1504). Moreover, as in the case of the three entries for which Customs purposely requested, received, and reviewed additional information bearing on the issue at hand in *Precision II*, the proposed regulatory text requires that Customs actually do something of significance in order to create a treatment (as distinguished from cases in which Customs gives at most cursory attention, such as informal entries and entries of small value or quantity). Therefore, the proposed regulatory text stands for the proposition that, in order for a person to be eligible for the protection afforded under 19 U.S.C. 1625(c)(2), that person must be able to make a showing that Customs took a conscious, intentional and knowledgeable action that created an impression that could give rise to an expectation as regards future action by Customs. Customs believes that this is entirely consistent with the facts involved in *Precision II*.

Customs remains of the view that the principle reflected in the proposed text is necessary because it reflects the reality in which Customs operates. With over 18 million formal entries filed each year, almost all of which are filed electronically and the majority of which are not accompanied by invoices, Customs simply does not have the resources to review every transaction and at the same time facilitate the movement of goods in international trade. In the absence of a reasonable limitation on the circumstances in which a treatment may arise for section 1625(c) purposes as set forth in the proposed regulatory text, Customs believes that a number of potential negative consequences could result either separately or together: Customs would have to monitor all Customs

transactions of whatever type arising over the preceding two years before issuing a ruling or decision to determine if section 1625(c) procedures are necessary; the number of times in which Customs must initiate section 1625(c) procedures would increase drastically; the entry and liquidation process would suffer significant delays; and/or the prospective ruling and internal advice procedures would be scaled back or eliminated in their entirety. All of the foregoing results would be inconsistent with the objectives of the Mod Act and importers' responsibilities under 19 U.S.C. 1484(a).

As regards the 2-year period prescribed in the proposed regulatory text, Customs pointed out in the preamble portion of the July 17, 2001, notice of proposed rulemaking that the proposed definition of "treatment" was drawn in part from the text of present § 177.9(e) which concerns the use of delayed effective dates in the case of ruling letters covering transactions or issues not previously the subject of ruling letters and which have the effect of modifying the treatment previously accorded by Customs to substantially identical transactions. Customs expressed in this regard the belief that use of the present regulatory standards in this new regulatory text was appropriate because, given the similarity in language, it seemed clear that the present regulation served as the model for the subsequently enacted statutory text except that application of a delayed effective date was now mandated. Customs also in that preamble stated the view that all provisions regarding detrimental reliance should be removed from the Part 177 texts because they were superseded by the section 1625(c) provisions. These remain the views of Customs. Consequently, the 2-year period set forth in the proposed text, which reflects the period prescribed in the detrimental reliance provision for treatments in present § 177.9(e) is appropriate and should be retained. Finally, as regards the commenter's assertion regarding the use of the Freedom of Information Act to obtain the information to provide to Customs covering the 2-year period, Customs does not believe that importers will effectively be able to do this because Customs does not retain the necessary information in such a way that it would on its face demonstrate the existence of a treatment.

Comment:

One commenter argued that Customs should adopt a reasonable standard for determining whether a "treatment accorded substantially similar transactions" exists. Customs should not follow through with its attempt to limit the standard for determining whether there has been such treatment. This commenter also asserted that the requirement that only entries actually reviewed by Customs (as opposed to entries liquidated by operation of law, through bypass or other automatic liquidation procedure) will count is irrational. Another commenter claimed that the limitation of treatment to instances in which Customs made a deliberative decision, usually requiring a physical examination of goods, is not adequately justified by Customs and is as objectionable as the

suggestion that, where there is a no change liquidation, there is no Customs decision to protest.

Customs response:

For the reasons stated in the preceding comment response, Customs believes that the proposed text set forth a reasonable standard for determining whether a "treatment" exists, and Customs further suggests that the rationality of that approach is supported by the holding in *Precision I* that "treatment" looks to the *actions* of Customs. Similarly, Customs believes that the preceding comment response adequately justifies the deliberative decision standard reflected in the proposed text. Finally, the comment regarding no change liquidations and protest decisions involves a separate statutory and regulatory context and therefore is inapposite.

Comment:

Based on the regulations as proposed, importers and other interested parties have little or no ability to require Customs to examine specific transactions. The review of transactions is the responsibility of Customs. Accordingly, the term "treatment" should include all importations, not just those which Customs has actually examined.

Customs response:

While Customs generally agrees with the first two statements of this commenter, Customs disagrees with the commenter's conclusion. As indicated earlier in this comment discussion, Customs must deal with a very large number of import transactions each year and must at the same time facilitate international trade. It is simply impossible for Customs to facilitate trade and at the same time review all import transactions. Accordingly, Customs has adopted procedures, such as selectivity and bypass, which are intended to strike a workable balance between these two competing goals. As a result, the vast majority of import transactions do not receive Customs review. Since those unreviewed transactions receive no action on the part of Customs, they should not be considered to constitute a "treatment" within the meaning of 19 U.S.C. 1625(c).

Comment:

Three commenters complained that the burden of proof to show a treatment (a listing by entry number, quantity and value, port of entry, and date of final action by Customs) is too great. Moreover, these commenters suggested that if Customs is not totally uniform in its treatment, the proposed regulations would appear to excuse Customs from a finding that there is a treatment triggering rights to the public.

Customs response:

Customs disagrees with the comment regarding the alleged burden, for two reasons. First, the regulatory standard reflected in the proposed text follows the text of present § 177.9(e)(2) in this regard, and Customs is not aware that importers have had particular difficulty in meeting the

burden of showing reliance on previous treatment under that provision. Second, the proposed regulatory standard appears to be consistent with the evidence of treatment on substantially identical transactions that the court in *Precision I* deemed appropriate for section 1625(c) purposes. The court noted in this regard that the plaintiff did not meet the necessary burden when it failed to provide information regarding the dates, ports and nature of the earlier transactions and a clear description of the merchandise at issue.

With regard to the issue of uniformity, several points should be noted. First, reference in the regulatory text to a "consistent pattern" in the definition of "treatment" was intended to apply only to the person claiming the treatment and not to actions of Customs involving substantially identical transactions of other persons. Moreover, there is nothing in the proposed text that requires 100 percent consistency. Customs avoided imposing a strict 100 percent requirement in recognition of the fact that a finding of reliance on a previous treatment could be reasonable even if the pattern of treatment was not entirely consistent, for example, where the actions of Customs were consistent over the entire 2-year period in all ports for a significant number of entries except for a relatively small number of isolated exceptions. On the other hand, Customs does not believe that a person should be able to claim the existence of a treatment for section 1625(c) purposes when there is no consistency in the pattern of actions by Customs, that is, when the general pattern is that different results have been reached in different ports, because the different actions of Customs can give rise to no expectation on the part of the importer regarding the specific treatment that his transactions will receive from Customs. Further, it should be noted that, in actual practice, Customs has never denied a claim of treatment based solely on an importer not having had 100 percent consistent treatment: each determination has been based on consideration of all the relevant facts involved.

Comment:

Three commenters argued that, in determining whether a treatment exists, Customs should not disregard outright informal entries or other entries where there is less scrutiny. These commenters noted that informal entries are allowed for low value shipments but that there are certain informational requirements for these low value shipments which allow Customs to use selectivity criteria to review those shipments, and they therefore suggested that informal entries should not be disregarded. Similarly, these commenters asserted that just because Customs does not choose to examine certain merchandise does not mean that the action of Customs in liquidating entries is entitled to no weight. With regard to the statement that little weight will be given for treatment purposes to transactions that have small quantities or values, another commenter noted that test transactions are legitimate importations and that for some kinds of merchandise, such as machines, small quantities are the norm.

Customs response:

As already pointed out in this comment discussion, the key issue in determining whether a treatment exists is whether, and if so the manner in which, Customs has taken action on past transactions. The reference in the proposed text to informal entries was made in a context in which there is no examination or review, and therefore the regulatory text would not preclude the consideration of informal entries on which Customs took specific action such as an examination of the merchandise or a detailed review of the supporting entry documentation. Moreover, the mere fact that Customs does not examine the merchandise does not mean that an action leading to a treatment cannot occur, because other actions by Customs, such as a review of the entry documentation or a request for additional information from the importer, can constitute adequate evidence of the existence of a treatment. Similarly, there is nothing in the proposed text that would preclude the consideration of "test transactions," and Customs further notes that transactions involving low quantity merchandise such as machines may be appropriate for consideration under the proposed text because their value probably would be significant and thus might warrant the specific attention of Customs. Finally, it should be noted that Customs has cooperated with importers and their counsel on "test transactions" or "test shipments" in resolving Customs transaction issues. It would be disingenuous of importers to "blind-side" Customs by using these test shipments as a basis for claiming that a "treatment" exists rather than advising Customs that a valid Customs transaction issue exists which warrants examination.

Comment:

Customs should delete from § 177.21 paragraph (d)(1) which sets forth exceptions to the notice requirements.

Customs response:

Customs is firmly of the opinion that paragraph (d)(1) of the proposed text should be retained in its entirety for the reasons stated in the preamble portion of the July 17, 2001, notice of proposed rulemaking, and Customs notes that the commenter provided no justification for its suggested change. The paragraph (d)(1) provisions are intended to avoid redundancy and to provide exceptions in the case of changes not occasioned by actions taken by Customs. The proposed text thus implicitly recognizes the true purpose of the section 1625(c) provisions which was only to protect importers and others from sudden actions taken by Customs. This intent was recognized in *Precision II* where the court, in discussing the relevant legislative history, noted the statement in Senate Report No. 103–189 that "importers have a right * * * to expect certainty that the Customs Service will not unilaterally change the rules without providing importers proper notice and opportunity for comment." There is nothing in the statute or its legislative history that would suggest that Congress intended that the procedural safeguards set forth in section 1625(c) would apply in the case of rulings, decisions

or treatments of Customs that are affected by subsequent laws passed by Congress or by subsequent actions taken by the President or other Executive Branch agencies or by subsequent decisions by the courts or by collateral public notice and comment procedures pursued by Customs under other authority. Rather, Customs believes that the opposite conclusion must be reached, and in this regard Customs notes that in *Sea-Land Service, Inc. v. United States*, 239 F.3d 1366 (Fed.Cir. 2001), the United States Court of Appeals for the Federal Circuit upheld the conclusion of the Court of International Trade that, where Customs made decisions as a result of a court decision that established a statutory interpretation that in effect modified or revoked previous Customs decisions, the notice and comment requirements of section 1625(c) did not apply and would serve no purpose because Customs was bound by the court decision and had no discretion to modify the court decision and thus would be unable to respond to any comments it received.

Comment:

Proposed § 177.21(d) appears to be inclusive. However, proposed § 177.21(d)(1)(iv) should be amended by adding the words "overturns or" after "which."

Customs response:

Customs believes that the suggested change would result in a redundancy and therefore would not improve the text. The proposed text refers to a judicial decision "which has the effect of overturning the Customs position" in order to cover not only Customs positions that are directly affected by the judicial decision (for example, where a specific Customs ruling or decision is subjected to judicial review) but also cases in which the issue decided by the court has a substantive effect on rulings, decisions or treatments of Customs that are not directly at issue in the litigation. The suggested change in wording would appear to set forth a distinction without a difference (in other words, a judicial decision that "overturns" something equally has the "effect of overturning" that thing). Accordingly, no change should be made in this regard. This conclusion would comport with the facts and result under the *Sea-Land* case referred to in the preceding comment response.

Comment:

Customs should not adopt the position that petitions filed under 19 U.S.C. 1516 can be decided using the procedures of 19 U.S.C. 1625(c) if the petition is filed by a domestic party, Customs agrees with the position of the domestic party, and there is an outstanding ruling in conflict with this position. If a domestic party files under section 1516, Customs is obligated to decide the issue under that statute and to provide all involved parties with the procedural safeguards dictated in that statute. Customs should not subvert the provisions of section 1516 by substituting procedures established by section 1625.

Customs response:

The comment relates to paragraph (d)(1)(v) of proposed § 177.21 which provides that the publication and issuance requirements of paragraphs (b) and (c) will not apply in circumstances in which a decision is published in the Federal Register as a result of a petition by a domestic interested party pursuant to 19 U.S.C. 1516. Customs explained in the preamble to the July 17, 2001, notice of proposed rulemaking that this provision was included because Customs did not believe that sound administrative practice would be well served by repeating in a 19 U.S.C. 1625(c) procedure what was already accomplished in a 19 U.S.C. 1516 context. Since the proposed regulatory text refers to, and therefore does not preclude, use of the 19 U.S.C. 1516 procedure, the commenter's stated concern does not relate to the wording of the regulatory text.

Rather, the commenter's concern appears to be directed to the related discussion in the preamble to the July 17, 2001, notice of proposed rulemaking regarding the procedures Customs would follow in those infrequent cases that could potentially give rise to both statutory procedures. Customs stated in this regard that the following internal approach had been developed to avoid any possible conflict between the two procedures: (1) if Customs agrees with the position presented by a domestic interested party under 19 U.S.C. 1516, Customs will then attempt to determine whether there is an extant ruling, internal advice decision, protest review decision or treatment that is in conflict with that position and, if it is determined that a conflict exists, then Customs will initiate the 19 U.S.C. 1625(c) modification or revocation procedure; or (2) if the position of Customs differs from the position of the domestic interested party and that party contests the Customs position, the matter will be resolved in accordance with the 19 U.S.C. 1516 publication procedures. The commenter appears to take issue with the first alternative procedure to the extent that it indicates that Customs would pursue a modification or revocation under section 1625(c) in lieu of an action under section 1516.

Customs believes that the alternative procedures outlined in the preamble to the July 17, 2001, notice of proposed rulemaking promote needed administrative flexibility and efficiency. Accordingly, Customs believes that the procedures outlined in the preamble to the July 17, 2001, notice of proposed rulemaking are appropriate and therefore should be retained.

Additional Changes to the Regulatory Texts

A. Additional modifications to the proposed § 177.21 text

In view of the significant number of comments submitted on the issue of treatments under the proposed § 177.21(c) text, and based on further review of this issue, Customs has determined that some other changes, in addition to those mentioned in the above comment discussion, should be incorporated in the regulatory text adopted in this final rule document. These additional changes, which Customs believes are necessary

to address issues raised by the commenters or to otherwise clarify the intent behind the proposed text, involve the following:

1. The second sentence of paragraph (c)(1) has been revised to read "[t]he following rules will apply for purposes of determining under this section whether a treatment was previously accorded by Customs to substantially identical transactions of a person." This change results in the removal of the definition of "treatment" in favor of a sequence of subparagraphs ((i) through (iv)) that set forth all operative standards for determining whether paragraph (c) applies. The reference at the end to identical transactions "of a person" is intended to reflect the necessary connection between the transactions and the person claiming the treatment.

2. Subparagraph (i)(A), which has no direct counterpart in the proposed text, provides that there must be evidence to establish that there was "an actual determination by a Customs officer" regarding the facts and issues involved in the claimed treatment. This is intended to clarify the point made in the above comment discussion that, as supported by the conclusion reached by the court in *Precision II*, there must be some review or other *action* on the part of Customs. The words "actual determination" are intended to clarify that there must be a conscious, intentional, purposeful act by a Customs officer, as distinguished from a result that arises out of an involuntary event such as an automatic liquidation or a liquidation by operation of law.

3. Subparagraph (i)(B), which also has no direct counterpart in the proposed text, provides that there must be evidence to establish that the Customs officer making the actual determination "was responsible for the subject matter" on which the determination was made. This provision is a corollary to the subparagraph (i)(A) requirement and is necessary to ensure that actions taken by Customs officers that create treatments for section 1625(c) purposes involve the exercise of proper authority and supervisory control and thus accurately represent the policy of Customs. In other words, Customs believes that it would not be appropriate for a person to rely on the advice of a Customs officer for treatment purposes if that Customs officer has no official responsibility for, and therefore no particular competence in, the issue at hand (for example, a drawback liquidator should not be relied upon for advice regarding country of origin marking requirements). This position is consistent with the facts involved in *Precision I* and *Precision II* and with the result reached by the court in *Precision II* in that the action taken by Customs that resulted in the creation of the treatment was taken by Customs officers assigned to a Customs office, that is, a drawback unit/office, specifically designated for the purpose of liquidating drawback entries.

4. Subparagraph (i)(C) follows the 2-year period provision contained in the proposed text but incorporates a number of changes. The new text provides that there must be evidence to establish that over a 2-year period "preceding the claim of treatment" (rather than "prior to publication

of the notice") Customs "consistently applied that determination on a national basis" (rather than requiring "a consistent pattern of decisions") as reflected in liquidations of entries or reconciliations "or other Customs actions" with respect to "all or substantially all of that person's Customs transactions involving materially identical facts and issues." The "preceding * * *" language merely reflects that the time the claim is made (which, under paragraph (c)(2)(ii) could occur after publication of the notice of proposed modification or revocation), rather than the date of publication of the notice by Customs, is more relevant in identifying the 2-year period for purposes of protecting the treatment rights of a person. The language that replaced the reference to "a consistent pattern of decisions" is intended (1) to avoid any uncertainty as regards what a "pattern" is, (2) to reflect the principle that, as pointed out in the comment discussion above and as reflected in the action taken by Customs on the 69 entries discussed by the court in *Precision II*, more is needed than merely a determination, that is, Customs must do something beyond making the determination, such as apply the determination in the liquidation of entries, and (3) to ensure that a treatment does not result from a geographically narrow application of a determination that is different from the action taken by Customs on that person's substantially identical transactions at other locations. The addition of the reference to "other Customs actions" is intended to clarify that Customs actions that can give rise to a treatment are not limited to liquidations. The words "all or substantially all" are intended to reflect the point made in connection with the above comment discussion that 100 percent consistency is not required for purposes of finding that a treatment exists with regard to a person's Customs transactions. Finally, the words "materially identical facts and issues" were included to clarify what is meant by the words "substantially identical" when used with reference to transactions in the introductory text of paragraph (c)(1).

5. At the end of subparagraph (ii), which repeats much of proposed paragraph (c)(1)(i), the words "import specialist review" have been replaced by "Customs officer review" to reflect the fact that review actions that can create treatments are not limited to actions of Customs import specialists.

6. Subparagraph (iii)(A) provides that Customs will not find that a treatment was accorded to a person's transactions if the person's own transactions were not accorded the treatment in question over the prescribed 2-year period. This provision represents a restatement, without substantive change, of the principle reflected in proposed paragraph (c)(1)(ii) that treatment is personal.

7. Subparagraph (iii)(B) provides that Customs will not find that a treatment was accorded to a person's transactions if the issue in question involves the admissibility of merchandise. This provision has no direct counterpart in the proposed text and has been added to clarify the existence of the essential rule that the admissibility of merchandise is always determined at the time of importation and therefore cannot be

the subject of a treatment for purposes of section 1625(c). The reason for this should be clear: in the case of merchandise that is not admissible (for example, because the merchandise has been found to exceed an applicable quantitative limit or has been found to constitute prohibited merchandise), an importer should not be allowed to continue to enter the merchandise in the United States in contravention of the applicable law regarding its non-admissibility merely because Customs has failed to follow the publication procedures under section 1625(c).

8. Subparagraph (iii)(C) provides that Customs will not find that a treatment was accorded to a person's transactions if the person made a material false statement or material omission in connection with a Customs transaction or in connection with the review of a Customs transaction and that statement or omission affected the determination on which the treatment claim is based. This provision has no direct counterpart in the proposed text and has been added to ensure that a person cannot profit from the section 1625(c) treatment provisions in circumstances in which the claimed treatment rests on a false premise resulting from an act or omission on the part of the person claiming the treatment. Customs believes that this rule is an appropriate expression of principles of equity and fair play.

9. Subparagraph (iii)(D) provides that Customs will not find that a treatment was accorded to a person's transactions if Customs advised the person regarding the manner in which the transactions should be presented to Customs and the person failed to follow that advice. This provision has no direct counterpart in the proposed text. It has been added because Customs believes that it would be inconsistent with the reliance and consistency principles that underlie the treatment provisions for a person to claim a treatment that is inconsistent with specific advice provided by Customs. Moreover, even if Customs officers have taken determinative action on the person's individual transactions that is inconsistent with the advice provided elsewhere by Customs, the person should have no expectation that Customs will continue to take those inconsistent actions in the future.

10. Subparagraph (iv) repeats the text of proposed paragraph (c)(1)(iii) regarding the burden of proof as regards the existence of the previous treatment but with the following changes: (1) in the first sentence, the words "burden of proof" have been replaced by "evidentiary burden" to avoid an overly strict standard; (2) in the second sentence, reference is made to "materially" (rather than "substantially") identical transactions to align on the language used in subparagraph (i)(C) as discussed above; and (3) at the end of the second sentence, the words "and, if known, the name and location of the Customs officer who made the determination on which the claimed treatment is based" have been added to specify other information, if available, that a person may use to convince Customs that the claimed treatment exists. In addition a third sentence has been added to the proposed text to provide that, in cases in which an entry is liquidated without any Customs review, the person

claiming a previous treatment must be prepared to submit to Customs written or other appropriate evidence of the earlier actual determination of a Customs officer that the person relied on in preparing the entry and that is consistent with the liquidation of the entry. Customs believes that this provision, which is related to the standard under subparagraph (i) that there must be a determination of Customs that has been applied to transactions, is necessary in order to enable persons to demonstrate the existence of a treatment when no specific determination was made on the person's individual transactions (an example would be where Customs issued a prospective ruling to another person and the person claiming the treatment followed that ruling in entering his identical merchandise and Customs liquidated those entries as entered and without review—presentation of the ruling to Customs would satisfy the regulatory standard).

11. Finally, at the end of the notice procedures in paragraph (c)(2)(i), the text regarding written confirmation has been simplified by referring to confirmation "sent to each person identified as having had substantially identical transactions * * *." This change conforms the text to current administrative practice.

B. Modification of present Part 177 to accommodate the final modification/revocation text

In light of the decision discussed earlier in this document to proceed with a final rule only as regards those proposed Part 177 regulatory changes that relate to the modification/revocation provisions of 19 U.S.C. 1625(c), the proposed § 177.21 text must have a new section designation in order to appear properly within the existing Part 177 structure. Accordingly, Customs in this final rule document has designated the new modification/revocation section as § 177.12 (with a consequential redesignation of present § 177.12 as § 177.13) so that it will appear after both the provision that deals with the issuance of prospective rulings (§ 177.8) and the provision that concerns the issuance of internal advice decisions (§ 177.11), because issued prospective rulings and internal advice decisions may be the subject of a modification or revocation under the new section. In addition, some minor conforming changes have been made to the wording of paragraph (a) of new § 177.12 to reflect the fact that the other structural changes to Part 177 contained in the July 17, 2001, notice of proposed rulemaking are not being adopted in this final rule document.

In addition, this final rule document makes a number of conforming changes to other existing sections within Part 177 as a consequence of the addition of new § 177.12. These changes are as follows:

1. In the second sentence of paragraph (b)(2)(ii)(B) of § 177.2, the reference to "§ 177.12" has been changed to read "§ 177.13."

2. The heading of § 177.9 has been revised to remove the reference to modification or revocation which will no longer be treated in that section.

3. The last sentence of paragraph (a) of § 177.9 has been revised to reflect the proper reference to the new modification and revocation provisions and to refer to the Federal Register (rather than the CUSTOMS BULLETIN) which is the publication medium mentioned in the referenced § 177.10(e).

4. The first sentence of paragraph (c) of § 177.9 has been revised to include exception language when the public notice and comment provisions of new § 177.12 apply.

5. Paragraph (d) of § 177.9 has been removed because it concerns the modification or revocation of ruling letters and therefore is entirely superseded by the provisions of 19 U.S.C. 1625(c) and new § 177.12.

6. Paragraph (e) of § 177.9, which concerns ruling letters modifying past Customs treatment of transactions not covered by ruling letters, has been removed because it also is entirely superseded by the provisions of 19 U.S.C. 1625(c) and new § 177.12. It remains the position of Customs that these paragraph (e) provisions formed the basis for the statutory treatment provision, and in this regard the following was stated in the July 17, 2001, notice of proposed rulemaking (at 66 FR 37375) in discussing the definition of "treatment" in proposed § 177.21(c)(1):

> In setting forth these regulatory standards, Customs has relied in part on the text of present § 177.9(e) which concerns the use of delayed effective dates in the case of ruling letters covering transactions or issues not previously the subject of ruling letters and which have the effect of modifying the treatment previously accorded by Customs to substantially identical transactions. Customs believes that use of the present regulatory standards in this new regulatory text is appropriate because, given the similarity in language, it seems clear that the present regulation served as the model for the subsequently enacted statutory text except that application of a delayed effective date is now mandated.

7. Within § 177.10, which concerns the publication of decisions, the following changes have been made: (1) paragraph (b), which concerns the establishment of a uniform practice by publication of a ruling in the CUSTOMS BULLETIN, has been removed; (2) paragraph (c) has been revised: in order to remove the reference to a change of "position" in the paragraph heading; in order to remove the second sentence of paragraph (c)(1) which concerns Federal Register publication and public comment regarding a ruling that contemplates a change of practice resulting in the assessment of a lower rate of duty; in order to remove the third sentence of paragraph (c)(1) which concerns rulings resulting in a change of practice but no change in the rate of duty; and in order to remove paragraph (c)(2) which concerns Federal Register publication and public comment regarding a contemplated ruling that has the effect of changing a position of Customs; and (3) the first sentence of paragraph (e), which concerns effective dates, has been revised to include exception language regarding modifications and revocations under new § 177.12. The changes to paragraphs (b) and (c) are substantively similar to

changes reflected in the proposed revised Part 177 texts contained in the July 17, 2001, notice of proposed rulemaking. Customs explained in the preamble to that document in regard to those changes that, except in the case of an established and uniform practice where the proposed regulatory text was directly based on 19 U.S.C. 1315(d), it was proposed to remove all references to "uniform practice" or "practice" from the Part 177 texts. The principal reason for this was that the statutory and regulatory modification/revocation standards of 19 U.S.C. 1625(c) and proposed § 177.21 had rendered these provisions redundant or otherwise unnecessary. Customs would further add that a failure to make these changes in § 177.10(b) and (c) in this final rule document will give rise to conflicts with the new § 177.12 procedures, not only in regard to the vehicle for publication (Federal Register versus CUSTOMS BULLETIN) but also with regard to the circumstances in which publication of the contemplated ruling is required and when it would take effect. Since the new § 177.12 provisions devolve from a direct statutory mandate, Customs believes that they must take precedence.

Finally, although not directly related to 19 U.S.C. 1625(c) and new § 177.12, Customs notes that paragraph (a) of present § 177.10 and paragraph (b)(7) of present § 177.11 refer to publication or other availability within "120" days, whereas 19 U.S.C. 1625(a), which applies equally to prospective rulings and to internal advice decisions, requires publication or other availability within "90" days. In addition, paragraph (a) of present § 177.10 in two places refers to a "precedential" decision whereas 19 U.S.C. 1625(a) and new § 177.12 use the word "interpretive." The regulatory texts in question have been amended in this final rule document to align on the statute and new regulatory text.

CONCLUSION

Accordingly, based on the comments received and the analysis of those comments as set forth above, and after further review of this matter, Customs believes that the proposed regulatory amendments regarding the modification and revocation of rulings, decisions, and treatments and regarding the publication of decisions should be adopted as a final rule with certain changes as discussed above and as set forth below. This document also includes an appropriate update of the list of information collection approvals (see the Paperwork Reduction Act portion of this document below) contained in § 178.2 of the Customs Regulations (19 CFR 178.2).

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that these amendments will not have a significant economic impact on a substantial number of small entities. The regulatory amendments primarily represent a clarification of existing

statutory and regulatory requirements. Accordingly, the amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

PAPERWORK REDUCTION ACT

The collection of information contained in this final rule has been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1515–0228. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

The collection of information in Part 177 of the Customs Regulations is required in connection with the consideration of requests for, and issuance of, rulings or other written advice from Customs regarding the application of the Customs and related laws to current or future transactions, in connection with modifications or revocations of prior Customs rulings or treatments, or in connection with the issuance of country-of-origin advisory rulings and final determinations relating to Government procurement. Failure to provide the required information may preclude issuance of the requested advice by Customs or may preclude the application of the requested relief or other action by Customs. The likely respondents are individuals and business or other for-profit institutions, including partnerships, associations, and corporations, and their authorized agents.

The estimated average annual burden associated with the collection of information under Part 177 is 10 hours per respondent or recordkeeper. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the U.S. Customs Service, Information Services Group, Office of Finance, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229, and to OMB, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503.

DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 177

Administrative practice and procedure, Customs duties and inspection, Government procurement, Reporting and recordkeeping requirements, Rulings.

19 CFR Part 178

Administrative practice and procedure, Reporting and recordkeeping requirements.

AMENDMENTS TO THE REGULATIONS

Accordingly, for the reasons stated in the preamble, Parts 177 and 178 of the Customs Regulations (19 CFR Parts 177 and 178) are amended as set forth below.

PART 177—ADMINISTRATIVE RULINGS

1. The authority citation for Part 177 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States), 1502, 1624, 1625.

2. In § 177.2, the second sentence of paragraph (b)(2)(ii)(B) is amended by removing the reference "§ 177.12" and adding, in its place, the reference "§ 177.13".

3. In § 177.9:

a. The section heading is revised;

b. The last sentence of paragraph (a) is revised;

c. The first sentence of paragraph (c) is revised; and

d. Paragraphs (d) and (e) are removed and reserved.

The revisions read as follows:

§ 177.9 Effect of ruling letters.

(a) * * * See, however, § 177.10(e) (changes of practice published in the Federal Register) and § 177.12 (rulings which modify or revoke previous rulings, decisions, or treatments).

* * * * * * *

(c) *Reliance on ruling letters by others*. Except when public notice and comment procedures apply under § 177.12, a ruling letter is subject to modification or revocation by Customs without notice to any person other than the person to whom the ruling letter was addressed. * * *

* * * * * * *

4. In § 177.10:

a. In paragraph (a), the first sentence is amended by removing the number "120" and adding, in its place, the number "90" and removing the word "precedential" and adding, in its place, the word "interpretive", and the second sentence is amended by removing the words "a precedential" and adding, in their place, the words "an interpretive";

b. Paragraph (b) is removed and reserved; and

c. Paragraph (c) and the first sentence of paragraph (e) are revised to read as follows:

§ 177.10 Publication of decisions.

* * * * * * *

(c) *Changes of practice*. Before the publication of a ruling which has the effect of changing an established and uniform practice and which results in the assessment of a higher rate of duty within the meaning of 19 U.S.C. 1315(d), notice that the practice (or prior ruling on which that practice was based) is under review will be published in the Federal Register and interested parties will be given an opportunity to make written submissions with respect to the correctness of the contemplated change.

* * * * * * *

(e) *Effective dates*. Except as otherwise provided in § 177.12(e) or in the ruling itself, all rulings published under the provisions of this part will be applied immediately.

* * * * * * *

5. In § 177.11, the first sentence of paragraph (b)(7) is amended by removing the number "120" and adding, in its place, the number "90".

6. Section 177.12 is redesignated as § 177.13 and a new § 177.12 is added to read as follows:

§ 177.12 Modification or revocation of interpretive rulings, protest review decisions, and previous treatment of substantially identical transactions.

(a) *General*. An interpretive ruling, which includes an internal advice decision, issued under this part, or a holding or principle covered by a protest review decision issued under part 174 of this chapter, if found to be in error or not in accord with the current views of Customs, may be modified or revoked by an interpretive ruling issued under this section. In addition, an interpretive ruling issued under this section may have the effect of modifying or revoking the treatment previously accorded by Customs to substantially identical transactions. A modification or revocation under this section must be carried out in accordance with the notice procedures set forth in paragraph (b) or paragraph (c) of this section except as otherwise provided in paragraph (d) of this section, and the modification or revocation will take effect as provided in paragraph (e) of this section.

(b) *Interpretive rulings or protest review decisions*. Customs may modify or revoke an interpretive ruling or holding or principle covered by a protest review decision that has been in effect for less than 60 calendar days by simply giving written notice of the modification or revocation to the person to whom the original ruling was issued or whose current transaction was the subject of the internal advice decision or, in the case of a protest review decision, to the person identified on the Customs Form 19 as the protestant or to any other person designated to receive notice of denial of a protest under § 174.30(b) of this chapter. However, when Customs contemplates the issuance of an interpretive ruling that would modify or revoke an interpretive ruling or holding or principle covered by a protest review decision which has been in effect for 60 or more calendar days, the following procedures will apply:

(1) *Publication of proposed action*. A notice proposing the modification or revocation and inviting public comment on the proposal will be published in the CUSTOMS BULLETIN. The notice will refer to all previously issued interpretive rulings or protest review decisions that Customs has identified as being the subject of the proposed action and will invite any member of the public who has received another interpretive ruling or protest review decision involving the issue that is the subject of the proposed action to advise Customs of that fact. Interested parties will have 30 calendar days from the date of publication of the notice to sub-

mit written comments on the proposed modification or revocation and to advise Customs in writing that they are recipients of an affected interpretive ruling or protest review decision that was not identified in the notice.

(2) *Notice of final action*. In the absence of extraordinary circumstances, within 30 calendar days after the close of the public comment period, any submitted comments will be considered and a final modifying or revoking notice or notice of other appropriate final action on the proposed modification or revocation will be published in the CUSTOMS BULLETIN. In addition, a written decision will be issued to the person to whom, or on whose transaction, the original interpretive ruling was issued or, in the case of a protest review decision, to the person identified on the Customs Form 19 as the protestant or to any other person designated to receive notice of denial of a protest under § 174.30(b) of this chapter. Publication of a final modifying or revoking notice in the CUSTOMS BULLETIN will have the effect of modifying or revoking any interpretive ruling or holding or principle covered by a protest review decision that involves merchandise or an issue that is substantially identical in all material respects to the merchandise or issue that is the subject of the modification or revocation, including an interpretive ruling or holding or principle covered by a protest review decision that is not specifically identified in the final modifying or revoking notice.

(c) *Treatment previously accorded to substantially identical transactions*—(1) *General*. The issuance of an interpretive ruling that has the effect of modifying or revoking the treatment previously accorded by Customs to substantially identical transactions must be in accordance with the procedures set forth in paragraph (c)(2) of this section. The following rules will apply for purposes of determining under this section whether a treatment was previously accorded by Customs to substantially identical transactions of a person:

(i) There must be evidence to establish that:

(A) There was an actual determination by a Customs officer regarding the facts and issues involved in the claimed treatment;

(B) The Customs officer making the actual determination was responsible for the subject matter on which the determination was made; and

(C) Over a 2-year period immediately preceding the claim of treatment, Customs consistently applied that determination on a national basis as reflected in liquidations of entries or reconciliations or other Customs actions with respect to all or substantially all of that person's Customs transactions involving materially identical facts and issues;

(ii) The determination of whether the requisite treatment occurred will be made by Customs on a case-by-case basis and will involve an assessment of all relevant factors. In particular, Customs will focus on the past transactions to determine whether there was an examination of the merchandise (where applicable) by Customs or the extent to which those transactions were otherwise reviewed by Customs to determine the proper application of the Customs laws and regulations. For pur-

poses of establishing whether the requisite treatment occurred, Customs will give diminished weight to transactions involving small quantities or values, and Customs will give no weight whatsoever to informal entries and to other entries or transactions which Customs, in the interest of commercial facilitation and accommodation, processes expeditiously and without examination or Customs officer review;

(iii) Customs will not find that a treatment was accorded to a person's transactions if:

(A) The person's own transactions were not accorded the treatment in question over the 2-year period immediately preceding the claim of treatment;

(B) The issue in question involves the admissibility of merchandise;

(C) The person made a material false statement or material omission in connection with a Customs transaction or in connection with the review of a Customs transaction and that statement or omission affected the determination on which the treatment claim is based; or

(D) Customs advised the person regarding the manner in which the transactions should be presented to Customs and the person failed to follow that advice; and

(iv) The evidentiary burden as regards the existence of the previous treatment is on the person claiming that treatment. The evidence of previous treatment by Customs must include a list of all materially identical transactions by entry number (or other Customs assigned number), the quantity and value of merchandise covered by each transaction (where applicable), the ports of entry, the dates of final action by Customs, and, if known, the name and location of the Customs officer who made the determination on which the claimed treatment is based. In addition, in cases in which an entry is liquidated without any Customs review (for example, the entry is liquidated automatically as entered), the person claiming a previous treatment must be prepared to submit to Customs written or other appropriate evidence of the earlier actual determination of a Customs officer that the person relied on in preparing the entry and that is consistent with the liquidation of the entry.

(2) *Notice procedures*—(i) When Customs has reason to believe that a contemplated interpretive ruling would have the effect of modifying or revoking the treatment previously accorded by Customs to substantially identical transactions, notice of the intent to modify or revoke that treatment will be published in the CUSTOMS BULLETIN either as a separate action or in connection with a proposed modification or revocation of an interpretive ruling or holding or principle covered by a protest review decision under paragraph (b)(1) of this section. The notice will give interested parties 30 calendar days from the date of publication of the notice to submit written comments on the proposed modification or revocation and will invite any member of the public whose substantially identical transactions have been accorded the same treatment to advise Customs in writing of that fact, supported by appropriate details regarding those transactions, within that 30-day period. Within 30 calendar

days after the close of the public comment period, any submitted comments will be considered, notice of the final interpretive ruling or other final action on the proposed modification or revocation will be published in the CUSTOMS BULLETIN. Written confirmation of the applicability of a final modification or revocation will be sent to each person identified as having had substantially identical transactions that were accorded the same treatment.

(ii) If Customs is not aware prior to issuance that a contemplated interpretive ruling would have the effect of modifying or revoking the treatment previously accorded by Customs to substantially identical transactions, the interpretive ruling will be issued and generally will be effective as provided in § 177.19. However, Customs will, upon written application by a person claiming that the interpretive ruling has the effect of modifying or revoking the treatment previously accorded by Customs to his substantially identical transactions, consider delaying the effective date of the interpretive ruling with respect to that person, and continue the treatment previously accorded the substantially identical transactions, pending completion of the procedures set forth in paragraph (c)(2)(i) of this section.

(d) *Exceptions to notice requirements*—(1) *Publication and issuance not required*. The publication and issuance requirements set forth in paragraphs (b) and (c) of this section are inapplicable in circumstances in which a Customs position is modified, revoked or otherwise materially affected by operation of law or by publication pursuant to other legal authority or by other appropriate action taken by Customs in furtherance of an order, instruction or other policy decision of another governmental agency or entity pursuant to statutory or delegated authority. Such circumstances include, but are not limited to, the following:

(i) Adoption or amendment of a statutory provision, including any change to the Harmonized Tariff Schedule of the United States;

(ii) Promulgation of a treaty or other international agreement under the foreign affairs function of the United States;

(iii) Issuance of a Presidential Proclamation or Executive Order, or issuance of a decision or policy determination pursuant to authority delegated by the President;

(iv) Subject to the provisions of § 152.16 of this chapter, the rendering of a judicial decision which has the effect of overturning the Customs position;

(v) Publication of a decision in the Federal Register as a result of a petition by a domestic interested party pursuant to 19 U.S.C. 1516 (see part 175 of this chapter);

(vi) Publication of an interim or final rule in the Federal Register in accordance with 5 U.S.C. 553;

(vii) Publication of a final interpretative rule in the Federal Register in accordance with 5 U.S.C. 553 following public notice and comment procedures; and

(viii) Publication of a final ruling in the Federal Register in accordance with 19 U.S.C. 1315(d) and § 177.22 of this part relating to change of established and uniform practice.

(2) *Publication not required*. In the following circumstances a final modifying or revoking ruling will be issued to the person entitled to it under paragraph (b) or (c) of this section but CUSTOMS BULLETIN publication under paragraph (b) or (c) of this section is not required:

(i) The modifying ruling corrects a clerical error; or

(ii) The modifying or revoking ruling is directed to a ruling issued under subpart I of part 181 of this chapter relating to advance rulings under the North American Free Trade Agreement.

(e) *Effective date and application to transactions*—(1) *Rulings or decisions in effect for less than 60 days*. If an interpretive ruling or holding or principle covered by a protest review decision that is modified or revoked under this section had been in effect for less than 60 calendar days, the modifying or revoking interpretive ruling:

(i) Will be effective on its date of issuance with respect to the specific transaction covered by the modifying or revoking interpretive ruling: and

(ii) Will be applicable to merchandise entered, or withdrawn from warehouse for consumption, on and after its date of issuance.

(2) *Rulings or decisions in effect for 60 or more days*. If an interpretive ruling or holding or principle covered by a protest review decision that is modified or revoked under this section had been in effect for 60 or more calendar days, the modifying or revoking notice will, provided that liquidation of the entry in question has not become final, apply to merchandise entered, or withdrawn from warehouse for consumption:

(i) Sixty calendar days after the date of publication of the final modifying or revoking notice in the CUSTOMS BULLETIN under paragraph (b)(2) of this section; or

(ii) At the option of any person with regard to that person's transaction, on and after the date of publication of the final modifying or revoking notice in the CUSTOMS BULLETIN under paragraph (b)(2) of this section.

(3) *Previous treatment accorded to substantially identical transactions*. A final notice that modifies or revokes the treatment previously accorded by Customs to substantially identical transactions:

(i) Will be effective with respect to transactions that are substantially identical to the transaction described in the modifying or revoking notice 60 calendar days after the date of publication of the final modifying or revoking notice in the CUSTOMS BULLETIN under paragraph (b)(2) or paragraph (c)(2)(i) of this section; and

(ii) Provided that liquidation of the entry in question has not become final, will apply to merchandise entered, or withdrawn from warehouse for consumption:

(A) Sixty calendar days after the date of publication of the final modifying or revoking notice in the CUSTOMS BULLETIN under paragraph (b)(2) or paragraph (c)(2)(i) of this section; or

(B) At the option of a person who makes a valid claim regarding previous treatment, on and after the date of publication of the final modifying or revoking notice in the CUSTOMS BULLETIN under paragraph (b)(2) or paragraph (c)(2)(i) of this section.

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1624; 44 U.S.C. 3501 *et seq*.

2. In § 178.2, the table is amended by removing the listings for §§ 177.2, 177.5, 177.11, and 177.12 and adding, in their place, a listing for Part 177 to read as follows:

§ 178.2 Listing of OMB control numbers.

19 CFR Section	*Description*	*OMB Control No.*
* * * * * * *		
Part 177	Issuance of administrative rulings on prospective and current customs transactions	1515–0228
* * * * * * *		

ROBERT. C. BONNER,
Commissioner of Customs.

Approved: August 12, 2002.
TIMOTHY E. SKUD,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, August 16, 2002 (67 FR 53483)]